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THE LEGAL EFFECT OF SUNDAY.

JURISPRUDENCE is not, and from its nature can never be, an exact science in all its branches. Apart from legislation, legal rules are gradually and insensibly moulded by new and varying customs, and the most enduring triumphs of the law have resulted from its ability to adapt itself to the growing demands and different phases of society. By nothing is this more clearly marked than by the various lights in which, from time to time, the effect of Sunday has been judicially considered.

With the theological aspect of the day this article is not concerned; upon that, libraries have been written, with but little apparent result, save to intensify pre-existing prejudices.

During the first three centuries of this era Sunday became a recognised day of Divine worship, solely, it seems to be now conceded, owing to the customs and practice of the Christians at that period. In the well-known letter of Pliny to the Emperor Trajan (A. D. 107), he says: "The Christians affirmed that the whole of their guilt, or error, was that they met on a certain stated day before it was light and addressed themselves in a form of prayer to Christ, as to some God, binding themselves by a sacrament, not for the purposes of any wicked design, but never to commit any fraud, theft or adultery; never to falsify their word, nor deny a trust when they should be called upon to deliver it up; after which it

was their custom to separate, and then reassemble to eat in common a harmless meal." [1]

The earliest recognition of Sunday as a civil institution was by the celebrated edict of Constantine (A. D. 321), wherein it was declared that "On the venerable day of the sun let the magistrates and people residing in cities rest, and let all workshops be closed. In the country, however, persons engaged in the work of cultivation may freely and lawfully continue their pursuits, because it often happens that another day is not so suitable for grain-sowing or for vine-planting, lest by neglecting the proper moment for such operations the bounty of heaven should be lost."

This was subsequently followed by numerous laws enjoining rest (A. D. 326), prohibiting the exaction from a Christian of payment of any debt (A. D. 368), forbidding the transaction of business, or arbitration of causes (A. D. 386), suppressing certain games (A. D. 469), upon that day; and, in particular, the law of Leo and Anthemius (A. D. 469), that "The Lord's day we decree to be ever so honored and revered that it should be exempt from all compulsory process; let no summons urge any man; let no one be required to give security for the payment of a fund held by him in trust; let the serjeants of the courts be silent; let the pleader cease his labor; let that day be a stranger to trials; be the crier's voice unheard; let the litigants have breathing time and an interval of truce; let the rival disputants have an opportunity of meeting without fear, of comparing the arrangements made in their names, and arranging the terms of a compromise. If any officer of the courts, under pretence of public or private business, dares to despise these enactments, let his patrimony be forfeited."

In 538 the third Council of Orleans prohibited the labor allowed by Constantine, and in 585 the second Council of Macon further

[1] See Pliny's Letters, Book 10, Ep. 97; Bampton Lectures 55, 370; 1 Cox's Literature of the Sabbath Question 295–297, where the letter is given in full. In Fisher on the Sabbath 42, the authenticity of this letter is said to have been doubted, but the same facts are stated by other contemporary writers. see Hessey's Lectures 56 *et seq.*; "The Obligation of the Sabbath" (Phila. 1853); Cox's Lit. of the Sabbath, *passim*; Hughes' Essay on the Sabbath 9; 1 Mosheim's History of Christianity During the First Three Centuries, 186 *et seq.* In the time of Justin Martyr (A. D. 140) these customs were thus described: "All the Christians met together to read publicly the writings of the apostles and prophets; after this, the president made an oration to them, exhorting them to imitate and practice the things which they had heard, and after joining in prayer they used to celebrate the Sacrament and give alms;" quoted in "Essay on Institution of the Sabbath," 81.

provided: "Let none spend his leisure in litigation on the Lord's day; let none continue the pleading of any cause. If any one disregard this wholesome exhortation, if he be a lawyer let him lose the privilege of pleading the cause; if a clerk or monk, let him be shut out for six months from the society of his brethren."

The Anglo-Saxons adopted these canons, and imposed additional restrictions upon secular pursuits. Thus, by various laws, upon Sunday all work was forbidden (A. D. 673, 697, 749, 906), travelling (747), trading (925), and in the reign of Edgar the Peaceable (958) the Lord's day was declared to extend from three o'clock in the afternoon of Saturday until the dawn of Monday.[1] So, by a law of Alfred, for a theft committed on Sunday, double satisfaction was to be made; and multitudes of other and similar regulations, principally intended to support the then temporal ascendency of the church, also existed: Hessey's Bampton Lectures 119; Cox's Sabbath Laws 331–334; Neale on Feasts and Fasts; Heylin's History of the Sabbath, *passim;* Wilkins Spelman's Leges Anglo-Saxonicæ 11, 15, 77; Dugdale's Orig. Jur. 90, c. 32.

Many of these enactments being confirmed by William the Conqueror and Henry II., became part of the common law of England: per Lord MANSFIELD in *Swann* v. *Broome*, 3 Burr. 1599; 1 Wm. Black. 496, 526; and were alternately enlarged and restricted by subsequent legislation.[2]

The first statute of any general importance was that of 5 & 6 Edward VI., c. 3 (A. D. 1552), whereby, after reciting that there was nothing in the scriptures prescribing any certain day upon which Christians should refrain from labor, it was enacted that Sunday and certain other days should be strictly observed as holydays, provided that when necessity might require, it should be lawful "to labor, ride, fish, or work any kind of work": 5 Pickering's Stat-

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[1] For the time covered by Sunday at common law and in this country, see *Hiller* v. *English*, 4 Strobhart 493–497; *Fox* v. *Abel*, 2 Conn. 541; *Shaw* v. *Dodge*, 5 N. H. 462; *Stebbins* v. *Leowolf*, 3 Cush. 137; *Bryant* v. *Biddeford*, 39 Maine 193; *State* v. *Green*, 37 Missouri 466.

[2] 3 Edw. I., c. 51 [see 2 Inst. 264]; 28 Edw. III., c. 14; 27 H. VI., c. 5 (said by MANSFIELD, C. J., in *Drury* v. *Defontaine*, 1 Taunton 131, to be "a singular statute for it alters the course of a prescription"); 5 and 6 Edw. VI., c. 3; 1 Mary Sess. 2, c. 2; 1 Eliz., c. 2; 1 Jac. I., c. 25; 3 Jac. I., c. 4; 1 Chas. I., c. 1. [This statute does not prohibit, but rather impliedly allows any innocent recreation or amusement: 4 Black. Com. 64]; 3 Chas. I., c. 2; 13 Chas. II., c. 9; 29 Chas. II., c. 7

utes 351. And the same king ordered "that the Lords of the Council should upon Sundays attend the public affairs of this realm, despatch answers to letters for good order of state, and make full despatches of all things concluded the week before:" Heylin's History of the Reformation 78.

Nearly seventy years afterwards, in 1618, James I. issued his famous Book of Sports, wherein it was declared that "our pleasure is that after the end of Divine service, our good people be not disturbed, letted or discouraged from any lawful recreation," and this was confirmed by Charles I.[1]

Subsequently, in 1677, was passed the familiar Statute of Charles II. (29 Chas. II., c. 7; 8 Pick. Stat. 412), upon which the legislation in this country has mainly been based.

The principal sections of this act are the first and sixth. By the former, it is provided that "no tradesman, artificer, workman, laborer or other person whatsoever,[2] shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day, or any part thereof, works of necessity and charity only excepted;" and it is further enacted that no goods shall be then exposed to sale. By the latter section, it is provided "that no person or persons upon the Lord's day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace), but that the service of every such writ, process, warrant, order, judgment or decree, shall be void to all intents and purposes whatsoever."

The subsequent English legislation is immaterial, and its disposition has been rather to relax than to increase the stringency of prior provisions: Neale on Feasts and Fasts 194; 2 Brown & Hadley's Com. 377 n.; 2 Cox's Literature of the Sabbath 496.

Throughout the United States statutes more or less similar exist, differing from each other less in their declared purpose than in the means by which the result is attained. And while it would be unprofitable to minutely specify these shades of difference, yet cer-

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[1] See the declaration in 1 Cox's Literature of the Sabbath Question 446. In 2 American Law Review 226, it is stated that the Statute of 1 Chas. I., c. 1, "did away with the effect of the Book of Sports," but it has apparently been overlooked that the book was issued *verbatim* by that king in the ninth year of his reign.

[2] That is, persons *ejusdem generis* with those mentioned, and, therefore, neither a stage-driver nor farmer are within the act: *Sandiman* v. *Breach*, 7 B. & C. 96; *Regina* v. *Cleworth*, 4 B. & S. 926.

tain doctrines are common to all. A much broader field is covered by the legislation in this country than in England. There, it will be seen, the statute simply prohibits a certain class from pursuing their usual occupations; but here the intention is mainly to prevent all secular work of any kind by any person. In some states, however, the English legislation has been almost literally transcribed, and the construction there given adopted. Pending a judicial interpretation of the Statute of Charles, a doubt was expressed whether it applied to private transactions not visible to the public at large: *Bloxsome* v. *Williams*, 3 B. & C. 232; and this was followed in New York and North Carolina: *Boynton* v. *Page*, 13 Wend. 425; *Melvin* v. *Easley*, 7 Jones, Law (N. C.), 356; but it was subsequently held that the statute included all business or work, public or private, done in the ordinary calling of the persons therein specified: *Fennell* v. *Ridler*, 5 B. & C. 406,[1] although but one such offence can be committed on the same day: *Crepps* v. *Durden*, Cowp. 640; 1 Sm. Lead. Cas. 1073. And the true construction of the words "ordinary calling" has been declared to be "not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of a trade or business are parts of the *ordinary calling* of a man exercising such trade or business:" *Rex* v. *Whitnash*, 7 B. & C. 596; *Drury* v. *Defontaine*, 1 Taunt. 131; *Smith* v. *Sparrow*, *supra*; *Wolton* v. *Gavin*, 16 Ad. & E. (N. S.) 48; *Hazard* v. *Day*, 14 Allen 487; *State* v. *Conger*, 14 Ind. 396; *Salter* v. *Smith*, 55 Ga. 245.[2]

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[1] "One of the ablest judgments ever delivered:" BEST, C. J., in *Smith* v. *Sparrow*, 4 Bing. 84. The *dictum* of PARK, J., in the latter case, that the "worldly labor and business," mentioned in the Statute of Charles, was not qualified by the subsequent phrase, "or work of their ordinary callings," has never been followed.

[2] Hence it is not the ordinary calling of a farmer, to hire a laborer: *Rex* v. *Whitnash*, *supra*; of an attorney (if within the statute at all), to become responsible for his client: *Peate* v. *Dicken*, 1 C., M. & R. 422; or of a creditor to release a debt: *Allen* v. *Gardiner*, 7 R. I. 22; and the burden of proving this ordinary calling is, under statutes similarly expressed, obviously upon the party pleading the statute: *Sanders* v. *Johnson*, 29 Ga. 526; *Commonwealth* v. *Hart*, 11 Cush. 135.

Under the New Hampshire act providing that "no person shall do any work, business or labor of his *secular* calling to the disturbance of others," it is held that all secular work is prohibited, without regard to the *ordinary calling* of the offender, and is, moreover, to "the disturbance of others," if done in their presence, whether with or without their consent: *Smith* v. *Foster*, 41 N. H. 218; *George* v. *George*,

Many of these statutes contain an exception in favor of that not inconsiderable class of the community who have adhered to the traditional seventh day as a Sabbath, while others are less charitable, and are enforced against all denominations, regardless of their religious faith. And the constitutionality of this species of legislation has been so often affirmed that it is no longer an open question: *Commonwealth* v. *Wolf*, 3 S. & R. 48; *Specht* v. *Commonwealth*, 8 Penn. St. 312; *Society* v. *Commonwealth*, 52 Id. 126; *City* v. *Benjamin*, 2 Strob. 508; *Lindenmuller* v. *People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557; *Shover* v. *State*, 5 Eng. 259; *Voglesong* v. *State*, 9 Ind. 112; *Foltz* v. *State*, 32 Id. 215; *Commonwealth* v. *Colton*, 8 Gray 488; *Karwisch* v. *Mayor*, 44 Georgia 204; *State* v. *Ambs*, 20 Mo. 214; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Bird*, 19 Id. 130; *Gabel* v. *Houston*, 29 Texas 335; *Commonwealth* v. *Has*, 122 Mass. 40.[1]

The exception in favor of works of necessity or charity is universal, although the circumstances constituting a "necessity" within the meaning of these statutes must constantly vary, for "necessity itself is incapable of a sharp definition," and the question is determined by the moral fitness or propriety of the work: *Commonwealth* v. *Nesbit*, 34 Penn. St. 409; *Flagg* v. *Millbury*, 4 Cush. 243. So, "charity must include everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure:" *Doyle* v. *Lynn Railroad*, 118 Mass. 197.

Hence discharging filial or parental duties, *McClary* v. *Lowell*, 44 Vt. 116; *Logan* v. *Mathews*, 6 Penn. St. 417; *Horne* v. *Meakin*, 115 Mass. 331; releasing prisoners: *Salter* v. *Smith*, 55 Ga. 244; *Johnston* v. *People*, 31 Ill. 469; or ministering to illness or distress: *Gorman* v. *Lowell*, 117 Mass. 65; *Doyle* v. *Lynn*, 118 Id. 197, are never considered as violating any written law. Nor do the statutes apply to the performance of ordinary domestic services:

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47 Id. 27; while under the statute of Ohio prohibiting "*common* labor," only "manual" labor is forbidden: *Bloom* v. *Richards*, 2 Ohio St. 388.

[1] *Ex parte Newman*, 9 Cal. 502, which asserted a contrary doctrine, is practically overruled by subsequent cases in that state. In *Shreveport* v. *Levy*, 26 La. Ann. 671, an ordinance allowing Hebrews to work upon Sunday was declared invalid, and in *Cincinnati* v. *Rice*, 15 Ohio 225, the converse was decided, as the statute of Ohio does not apply to that religion.

Rex v. *Cox*, 2 Burr. 785; *King* v. *Younger*, 5 Term 449; *Crosman* v. *Lynn*, 121 Mass. 301; *Commonwealth* v. *Nesbit*, 34 Penn. St. 398; and executing a will has never been deemed to be either work, labor or business within these acts: *Bennett* v. *Brooks*, 9 Allen 118; *Beitenman's Appeal*, 55 Penn. St. 183; *Weidman* v. *Marsh*, 4 Penn. Law Jour. R. 401, 406; *George* v. *George*, 47 N. H. 27.

So, the necessity may arise out of particular trades or occupations. Thus vessels may sail and seamen must work: *Philadelphia Railroad* v. *Towboat Co.*, 23 How. 219; *Ulary* v. *The Washington*, Crabbe 208; *The Cyane*, 1 Sawyer 151; *Calder Company* v. *Pilling*, 14 Mees. & Wels. 76; and so of the transportation of the mail: *Commonwealth* v. *Knox*, 6 Mass. 76. Nor are common carriers exempt from responsibility for the safe custody of goods upon that day: *Powhatan Co.* v. *Appomattox Co.*, 24 How. 247; *United States* v. *Powell*, 14 Wall. 494; *Merritt* v. *Earle*, 29 N. Y. 115; *Jones* v. *Transportation Co.*, 50 Barb. 193; *Stallard* v. *Great Western Co.*, 2 B. & S. 419. So, too, highways must remain open for all necessary travel: *Murray* v. *Commonwealth*, 24 Penn. St. 270; *McArthur* v. *Green Bay Co.*, 34 Wis. 139; *Flagg* v. *Millbury*, 4 Cush. 243,[1] and property exposed to imminent danger may always be preserved: *Parmalee* v. *Wilks*, 22 Barb. 539; *Morris* v. *State*, 31 Ind. 189; *Hooper* v. *Edwards*, 18 Alabama 281; *McGatrick* v. *Wason*, 4 Ohio St. 566.

A contrary doctrine obviously prevails when the work is simply one of convenience or profit: *Jones* v. *Andover*, 10 Allen 18; *Commonwealth* v. *Sampson*, 97 Mass. 404; *Commonwealth* v. *Josselyn*, Id. 411; *McGrath* v. *Merwin*, 112 Id. 467; *Johnston* v. *Commonwealth*, 22 Penn. St. 102; 2 Am. Law Reg. 432, 517; *Pate* v. *Wright*, 30 Ind. 476.[2]

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[1] To one travelling in violation of a statute, however, it is clearly no justification that the highway was then open: *Scully* v. *Commonwealth*, 35 Penn. St. 511.

[2] In Pennsylvania it has been considered that running street cars on Sunday was against the statute: *Commonwealth* v. *Jeandell*, 2 Grant 506; 3 Phila. R. 509; *Sparhawk* v. *Union Pass. Railway*, 54 Penn. St. 401; but familiar as the practice is, no conviction has ever occurred under these decisions, and the contrary was intimated in the recent case of *Augusta Railroad* v. *Renz*, 55 Ga. 126, wherein it was said: "In view of the dependence of the people for travel, in the cities where street railroads have been established, by that mode of conveyance in going to church, visiting the sick, &c., we are not prepared to hold that the running of street railroads in cities and the vicinity thereof, where the same have been established, on Sunday, is not a work of necessity."

Express provisions against Sunday travelling also frequently exist, and, in those states, as no legal duty to furnish a safe highway is then imposed, a town is not liable for damages happening upon that day by reason of defective roads: *Johnson* v. *Irasburgh*, 47 Vt. 32; s. c. 14 Am. Law Reg. (N. S.) 547, 553, n.; *Bosworth* v. *Swansey*, 10 Metc. 363; *Jones* v. *Andover*, 10 Allen 18; *Connolly* v. *Boston*, 117 Mass. 64; *Cratty* v. *Bangor*, 51 Me. 423;[1] unless the person injured was either not travelling in the ordinary sense of the word, or was proceeding from motives of necessity or charity: *Gorman* v. *Lowell*, 117 Mass. 65; *Crosman* v. *Lynn*, 121 Id. 301; as a visit of a parent to his child: *McClary* v. *Lowell*, 44 Vt. 116; or walking for mere exercise: *Hamilton* v. *Boston*, 14 Allen 475; *O'Connell* v. *Lewiston*, 65 Me. 34: see *McGatrick* v. *Wason*, 4 Ohio St. 566.[2] But in actions of tort against individuals or common carriers it is no defence that the injury occurred upon Sunday, while the plaintiff was either travelling or engaged in his ordinary secular occupation: *Mohney* v. *Cook*, 26 Penn. St. 342; *Philadelphia Railroad* v. *Towboat Co.*, 23 How. 217; *Etchberry* v. *Levielle*, 2 Hilton 40; *Carroll* v. *Staten Island Co.*, 58 N. Y. 126; 65 Barb. 41; *McArthur* v. *Green Bay Co.*, 34 Wis. 139; *Sawyer* v. *Oakman*, 7 Blatch. C. C. 290; *Schmid* v. *Humphrey*, 48 Iowa 652; see *Cox* v. *Cook*, 14 Allen 165; *Richardson* v. *Kimball*, 28 Me. 463, 475. "The law relating to the Sabbath defines a duty of the citizen to the state, and to the state only; and hence it may be very proper for the state to refuse a remedy against itself or against any of its subdivisions, where an injury arises from bad roads, to one who is unlawfully travelling upon the Lord's day. But we should work a confusion of relations and lend a very doubtful assistance to morality if we should allow one offender against the law to the injury of another, to set off against the plaintiff that he too is a public offender:" *Mohney* v. *Cook*, *supra*.

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[1] In *Sutton* v. *Wauwatosa*, 39 Wis. 21, a different rule was applied to the liability of a town for the destruction of property being transported upon Sunday over a defective bridge; but this has been ably reviewed in *Johnson* v. *Irasburgh*, *supra*; *Alexander* v. *Oshkosh*, 33 Wis. 277. The cases in New Hampshire are decided upon a statute permitting work or travel if no disturbance to others results: *Dutton* v. *Weare*, 17 N. H. 34; *Norris* v. *Litchfield*, 35 Id. 271; *Corey* v. *Bath*, Id. 531.

[2] "It is not an *honest belief* that a necessity exists, but the *actual existence of the necessity* which renders travelling upon the Sabbath lawful:" *Johnson* v. *Irasburgh*, *supra*; *aliter* in criminal prosecutions: *Myers* v. *State*, 1 Conn. 504.

An opposite doctrine prevails in Massachusetts: *Stanton* v. *Metropolitan Railroad*, 14 Allen 485; *Feital* v. *Railroad*, 109 Mass. 398; *Smith* v. *Boston Railroad*, 120 Id. 490; 11 Am. Law Rev. 780; *Lyons* v. *Desotelle*, 124 Mass. 387; but the cases there upon this point have been said "to depend upon peculiar legislation rather than on any general principles of justice or law:" *Phila. Railroad* v. *Towboat Co.*, 23 Howard 218.

ANGELO T. FREEDLEY.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

EASBY v. PATTERSON.

In an action for use and occupation, a contract express or implied must be proved. A. occupied the dock adjoining B.'s wharf on the river Delaware with lighters unloading a ship at the next wharf, so that no vessel could use B.'s wharf without the removal of the lighters. A. refused to pay dockage to B. There was no evidence that any vessel had been prevented from coming to B.'s wharf on account of this occupation. In an action for assumpsit for use and occupation brought by B., *Held*, that judgment of nonsuit was properly entered.

ERROR to the Common Pleas No. 4, of Philadelphia county.

Assumpsit by William Easby against Robert Patterson & Son, for the use and occupation of plaintiff's dock.

On the trial, before THAYER, P. J., it appeared that the plaintiff was the owner of a wharf on the Delaware river, at the foot of Queen street, in the city of Philadelphia. The defendants were lightermen, whose business it was to load and unload vessels lying at the wharves. Between the plaintiff's wharf and the one adjoining, was a dock eighty feet in width, as required by the Act of Assembly of April 8th 1868.[1] In June or July 1876, a vessel was lying in the dock, moored to the side of the wharf adjoining plaintiff's, and the defendants were employed in discharging the cargo or ballast, and occupied the dock room to within a few feet

[1] "No license shall be granted under which a new wharf is to be built, unless the property from which said wharf is to be extended shall have appertaining thereto, sufficient breadth to have a dock or water surface at least forty feet wide on each side of such wharf, unless such Board of Wardens, by a vote of a majority of the whole board, shall decide that the public convenience demands a variance from this rule in any particular case:" Pamph. L. 756.